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NOTES.

FEDERAL LAW IN THE STATE COURTS.—In refusing to entertain jurisdiction of an action on the Employers' Liability Act recently brought in a Connecticut court, the court, after pointing out that the act in question established a statutory right of action with details of procedure so different from that of the State court that Congress must have intended it to be entertained only by Federal courts, raises a somewhat novel question of federal legislative power by its further holding that, though Congress may change the substantive law on a subject within its legislative purview and establish a new rule of right to be applied in Federal and State courts alike, its attempt to vest the jurisdiction of such a statutory action in the State courts, if so the act intended, would be outside its powers: (1) as an improper interference with the procedure and policy of State courts; and (2) as an unconstitutional delegation of federal judicial power. The court holds finally that in any event Congress could not compel them to assume jurisdiction.[1]

Considering first the second ground of the decision, its argument is this: vesting in State courts the authority to entertain an action on a federal

[1]This note is not concerned with the additional ground of the decision that the attempted changes of the substantive law of master and servant are unconstitutional.

statute which creates a remedy hitherto denied in similar causes by state and federal law is a violation of the principle that the judicial power of the United States shall not be vested in any court not created by the United States,[2] which follows from the constitutional provision that the whole federal judicial power shall be vested in the Supreme Court and in such courts as Congress may establish. Judicial power in the decisions which enunciated the principle means jurisdiction, and so the principle also takes the form that Congress cannot confer jurisdiction on State courts. The test of the validity of the application of this principle by the Connecticut court to the situation before it lies in the theory of the now admitted concurrent jurisdiction of State and Federal courts in cases arising under the laws of the United States. It is held that State courts with appropriate jurisdiction may take cognizance of such cases where the federal jurisdiction is not expressly exclusive, or impliedly so by the incompatibility of a concurrent state and federal jurisdiction in the particular class of case,[3] and *a fortiori* they may take cognizance of cases where Congress directs that they shall do so, and this in spite of the proposition that Congress cannot confer jurisdiction on State tribunals. No conflict of principle appears when it is explained that in such cases the State courts do not derive any authority or jurisdiction from Congress over the subject matter, but are simply exercising their ordinary jurisdiction which they possess by virtue of the State constitution and laws.[4] The basis of this explanation is a distinction, apparently lost sight of in the principal case, between jurisdiction, which has been defined as the "right to adjudicate upon"[5] a controversy, and the right which is determinative of the litigation.[6] Cases have confused the source of jurisdiction and the source of the right which a court, having jurisdiction of the litigation, may enforce.[7] Thus, no State can confer jurisdiction on another State, yet State courts properly enforce rights created by statutes of other States.[8] And though Congress can confer no jurisdiction on it, a State court having adequate inherent jurisdiction may enforce rights which rest on the laws of Congress.[9] So in the principal case the fact that the new right or remedy for the injured employee is created by a federal statute is, of itself, no objection to its enforcement by a State court having jurisdiction of the master and servant relation of the parties before it.[10]

Of course, Congress may expressly or by implication (arguable of the

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[2]Martin *v.* Hunter's Lessee (1816) 1 Wheat. 304, 330; Houston *v.* Moore (1820) 5 Wheat. 1, 27.

[3]Claflin *v.* Houseman (1876) 93 U. S. 130, 136.

[4]Story, 3 Const. U. S. Sec. 1749; Ward *v.* Jenkins (Mass. 1846) 10 Metc. 583, 589.

[5]Dicey, Conflict of Laws, p. XIII.

[6]Note to Loughin *v.* McCaulley (1898) 186 Pa. 517 in 48 L. R. A. 33.

[7]Vorhies *v.* Frisbie (1872) 25 Mich. 476; Federalist No. 82 (Governments having jurisdiction of the parties, enforce rights created by laws of foreign governments).

[8]Selma, Rome etc. R. R. *v.* Lacey (1873) 49 Ga. 106; Dennick *v.* R. R. Co. (1880) 103 U. S. 11.

[9]Cook *v.* Whipple (1873) 55 N. Y. 150, 160, 164; Morgan *v.* Dudley (Ky. 1858) 18 B. Mon. 693; Teal *v.* Felton (1848) 1 N. Y. 537.

[10]It is said by some courts that to found the necessary authority in State courts exercising concurrent jurisdiction a state statute is needed. *In re* Ramsden (N. Y. 1857) 13 How. Prac. 429. This appears to be true only of the rare class of cases of which a State court could not take cognizance by virtue of the jurisdiction originally reposed in it by the State in the act of its creation; otherwise, the court, having jurisdiction, would need no express permission to entertain the suit. Morgan *v.* Dudley *supra*, at 744.

act in question) make the jurisdiction of the Federal courts exclusive.[11] But it can establish and from its earliest history has established concurrent jurisdiction in State courts.[12] Moreover State courts even in the absence of express grant have taken jurisdiction of statutory actions created by Congress.[13] As to the right of Congress to compel a State court to entertain jurisdiction there is no satisfactory authority. On the one hand there is a statement of Chancellor Kent[14] that Congress cannot compel a State court to entertain jurisdiction in any case and a *dictum* of Justice Story[15] doubting the power, followed in several state decisions which decline to accept the function of entertaining naturalization proceedings.[16] There are also decisions which decline to accept jurisdiction of cases arising under federal penal statutes.[17] On the other hand presses the consideration that the laws of Congress are the law of the land, and State courts, having jurisdiction of the cause, are as strongly bound to recognize and enforce them as if they were enacted by the State.[18] Moreover the decisions on naturalization legislation are explainable by the fact that it required state judges to perform functions outside the scope of their strict judicial duty under the Constitution,[19] and the decisions on penal statutes by the well recognized rule that no sovereignty will enforce the criminal or penal statutes of another sovereignty.[20] It is well arguable, then, that Congress can demand as a matter of right that a State court entertain an action like that in question except for the possible reasons that the court cannot well conform its methods of procedure to the requirements of the Act and so is without the machinery to enable it to take jurisdiction,[21] or, as is advanced by the court as the first ground of its decision, an attempt by Congress to enforce such a change in procedure is beyond its powers.

On this precise question of the right of Congress to change the procedure of a State court by compelling it to entertain a statutory action with procedure contrary to the usual practice of the court there appear to be no decisions squarely in point. The Supreme Court has held that the right to maintain an independent judicial department is one of the important reserved rights of a State.[22] There is also a line of decisions on various taxing acts of Congress prohibiting the introduction in evidence in any court of documents not having a federal revenue stamp or requiring the stamping of summons or original proceedings, which assert the general proposi-

[11]Claflin *v.* Houseman *supra,* at 136.

[12]Judiciary Act of 1789 and acts cited in Claflin *v.* Houseman *supra,* at 139, 140.

[13]Morgan *v.* 1st Nat. Bank (1885) 93 N. C. 352; Bletz *v.* Columbia Nat. Bank (1878) 87 Pa. 87, 92; Ammidown *v.* Freeland (1869) 101 Mass. 303; Ward *v.* Jenkins *supra;* Claflin *v.* Houseman *supra.*

[14]Kent's Commentaries 399-403. The statement is supported only by cases which affirm the proposition first considered, namely, that Congress cannot confer jurisdiction on State courts, Ward *v.* Jenkins *supra;* Haney *v.* Sharp (Ky. 1833) 1 Dana 442, which goes to the question of whether or not the State court has the requisite authority, rather than to the question whether, assuming they possess jurisdiction by state law, they have an election as to its exercise in enforcing federal law.

[15]Prigg *v.* Pennsylvania (1842) 16 Peters 539, 622.

[16]State *v.* Penney (1850) 10 Ark. 621; Rushworth *v.* The Judges (N. J. 1895) 30 L. R. A. 761; Stephens, Petitioner (Mass. 1855) 4 Gray 559; *In re* Ramsden *supra.*

[17]Ely *v.* Peck (1828) 7 Conn. 239; U. S. *v.* Lathrop (N. Y. 1819) 17 Johns. 4.

[18]Claflin *v.* Houseman *supra,* at 137; Cook *v.* Whipple *supra,* at 164; Ward *v.* Jenkins *supra,* at 589; Hartley *v.* U. S. (Tenn. 1816) 3 Hayw. 45, 51.

[19]Robertson *v.* Baldwin (1896) 165 U. S. 279.

[20]Huntington *v.* Attrill (1892) 146 U. S. 657, 672.

[21]See Loughin *v.* McCaulley *supra,* at 521.

[22]Collector *v.* Day (1870) 11 Wall. 113, 126.

tion that Congress has no power to change the rules of evidence or practice[23] in State courts or invalidate their proceedings,[24] such a power being inconsistent with the free existence of state tribunals.[25] The authority of these cases on the exact point in issue is, of course, merely conjectural.

THE DUTIES OF PUBLIC SERVICE COMPANIES *Inter Se*.—In the conduct of their business, public service companies frequently enter into contracts with other public service companies, both for the establishment of an auxiliary, or dependant service, and for the formation of a connection between two services of the same kind. Thus a railroad company contracts with an express company for the carriage of express matter over its lines, and with a connecting carrier for through rates and connected service on traffic passing over both lines.

In the case of a dependant service, it is generally held that the railroad company by contract secures the performance of part of its own duty to the public. The duty recognized is to the public and not, apart from contract, to the express companies. It follows that the railroad company need not make similar arrangements with all express companies. It may make a contract with one company for exclusive express privileges, provided its duty to the public is discharged.[1] The minority view holds the railroads to a duty not to discriminate between express companies.[2] Recent criticism of the prevailing view, however, has granted that the railroad's duty is solely to the public served; but has insisted that the duty is not fully discharged under an exclusive contract. The price charged for a monopoly, it is argued, may be exorbitant, with the result that the express company's charges to the public will be unreasonable.[3] It is submitted that the recognition by the courts that such a contract does not relieve the railroad company from its duty to serve the public, supplies the answer to this objection.[4] The duty being not only to serve, but to serve at a reasonable rate, any contract by the railroad which results in unreasonable prices to the public would seem to violate the railroad's duty.

Contracts between connecting public services for through rates are no part of the duty to serve the public. A public service company is bound to serve only with its own equipment and capital. Such contracts, therefore, are not, apart from statute,[5] subject to governmental regulation, and may

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[23]Carpenter *v.* Snelling (1867) 97 Mass. 452, 458; Sporrer *v.* Eifler (Tenn. 1870) 1 Heisk. 633; Latham *v.* Smith (1867) 45 Ill. 29, 30.

[24]Warren *v.* Paul (1864) 22 Ind. 276; Walton *v.* Bryenth (N. Y. 1863) 24 How. Prac. 357.

[25]See upholding the tax Chartiers & Robinson Turnpike Co. *v.* McNamara (1872) 72 Pa. 278.

[1]The Express Cases (1886) 117 U. S. 1; Pfister *v.* Central Pac. R. R. Co. (1886) 70 Cal. 169.

[2]McDuffee *v.* Portland & Rochester R. R. (1873) 52 N. H. 430.

[3]Professor Bruce Wyman, 17 Green Bag 570.

[4]See Chicago etc. R.R. Co. *v.* Pullman Car Co. (1891) 139 U. S. 79, 89, 90.

[5]Such a statute was held constitutional in State *ex rel v.* Minneapolis etc. R.R. Co. (1900) 80 Minn. 191, 196, 197. The court in that case relied upon Jacobson *v.* Wisconsin etc. R.R. Co. (1898) 71 Minn. 519. This latter case came before the U. S. Supreme Court; but the question of the constitutionality of the provision was held not to be involved. Wisconsin etc. R.R. Co. *v.* Jacobson (1900) 179 U. S. 287, 295. The provisions of the Hepburn Act, Act of June 29, 1906 C. 3591, are similar.